STATEMENT OF FACTS.

The evidence at the trial shows that the petitioner was a successful business man, and that he gave a party, at which intoxicating liquor was served, which party started at approximately 9 P. M. on the 7th day of November, 1961, and continued on to about 7:30 A. M. on the 8th day of November, 1961. That the petitioner on the 8th day of November, 1961, at about 10:42 A. M., while operating his automobile within the city limits of Toledo, Ohio, ran through a number of warning cones placed on the street, struck a wood chipper, and slid under a dump truck, and made no attempt to avoid the accident. As soon as practicable, he was taken to the City of Toledo jail where he was interrogated, which took approximately fifteen minutes altogether. During the interrogation and before he submitted to a drunkometer test he was fully advised of his constitutional rights, that he did not have to answer any question if he did not wish to do so, as any statements made by him could be used against him.

During the course of interrogation, the petitioner was asked if he would be willing to take the Harger Drunkometer Test, and was advised that he did not have to take it if he did not want to, as the result could be used against him. The petitioner then asked if he could call his attorney. At no time was the petitioner told he could not do so and when it became obvious to the petitioner that the officer was going to book him and not release him, then he voluntarily agreed to take the drunkometer test. He had previously been advised that he could make his phone call right after he was booked. The record is quite clear that the petitioner was fully advised of his rights, that no duress or physical force was used upon him, and that he alone made the decision to take the drunkometer test rather than wait and call his attorney for reasons of his own.

REASONS WHY THIS WRIT SHOULD NOT BE GRANTED.

1. Petitioner Was Not Denied His Constitutional Right to Confer With His Attorney.

The delay in denying request of petitioner to call his attorney was not unreasonable. In the matter of a person's right to confer privately with his counsel, the Ohio Rule and the general rule seems to be that a person has such right *at all reasonable times.* (Emphasis added.) This is the rule as stated in *Snook vs. State,* 34 O. App. 60, 77.

It is also stated by the Supreme Court of Ohio in *Sheppard vs. Koblentz,* 174 O. S. 120 at p. 123:

> "To show an abuse of discretion, it is necessary to show more than an error of judgment; rather it is necessary to show an act that is fostered by perversion of will, passion or prejudice."

In our case at hand the petitioner was interviewed for a total of only fifteen minutes. This does not compare with the numerous cases on this question in which hours, days, and even weeks are involved.

The police officers have certain procedures that they are required to follow in order to adequately carry out their duties. For a driving under the influence case such as this one, they have a form that they are required to complete. Before asking the questions of the offender, they explain to him that he does not have to answer the questions, and that if he does, the answers can be used against him. They then proceed to complete the form according to the answers given to them. One of the questions asked is whether or not the defendant is willing to submit to a drunkometer test. If the defendant refuses to answer any of the questions, it is marked on the form that he did such. This same procedure was followed in

the case now before the Court. Surely the petitioner is not contending that the police officers do not have a right to ask questions of him after advising him he does not have to answer.

Let us take for an example that a defendant at the scene, where he is being arrested, asked to call his attorney. Does this mean that the police must immediately take him to a telephone before they can talk with him, observe him, or even take him to the police station? To answer this in the affirmative would be to make an unreasonable and unworkable task for the arresting officers. As long as the defendant is given a reasonable time to contact his attorney, no constitutional rights have been violated. Fifteen minutes cannot be deemed to be unreasonable.

The Court will recognize that the Harger Drunkometer is widely used throughout the nation and is a device to determine accurately the percentage of alcohol by weight in the system. It is an attempt to resolve the question of whether a person is under the influence of alcohol on a scientific basis. Everyone knows that alcohol does oxidize and that any lapse of time brings on a greater oxidization of alcohol in the system. Consequently, any delay in administering the test detracts from its accuracy. In such a situation, a request for counsel before deciding whether to take the test can easily become a dodge by the accused to bring about delay and thus lessen the chances for his conviction. We believe the Court can see the danger in adopting a doctrine which could easily allow interminable delay in administering the test.

While the respondent feels that the case of *Mapp vs. Ohio,* 367 U. S. 643, has no relation to this matter now before the Court as there is no illegally seized evidence involved, it is to be noted that the Court in that case at

page 653 reaffirmed *United States vs. Robinowitz,* 339 U. S. 56, in which it was held that:

> "What is a reasonable search not prohibited by the Fourth Amendment is not to be determined by any fixed formula and that what is a reasonable search not prohibited by the Fourth Amendment is in the first instance for the trial court to determine."

In our case at hand the trial court apparently felt there was no unreasonableness involved as the motion to suppress and objections made by the defendant regarding the drunkometer test were all overruled. The trial court stated as follows regarding this matter at page 9 of the transcript:

> "Motion is not timely made, and, secondly, the word 'cajoling' as used in the motion even if proven would not constitute grounds for suppression unless the evidence might indicate that there was duress or something of that sort which would cause him to take the test, physical force or duress."

The evidence does not indicate any of the above.

2. Petitioner Waived His Right to Counsel.

The facts of our case at hand are such that the defendant was a successful businessman, knew of his right to obtain counsel, knew the nature of the charge against him, and knew the purpose of the drunkometer test, and he still agreed to voluntarily submit to it. The record clearly shows that no duress or physical force was used on the defendant before he agreed to take the test. From these facts it is obvious that the defendant knowingly and intelligently, without duress, waived his right to counsel. There are a great many cases in which a defendant has waived his right to counsel and then pleaded guilty to a serious crime. If this is so, surely the petitioner here can

waive his right to counsel and voluntarily submit to a drunkometer test. That a defendant can waive his right to counsel has been recognized by the Supreme Court of the United States in *Betts vs. Brady,* 316 U. S. 455 at pages 464 and 465, where it is stated:

> "We have construed the provision (Sixth Amendment to the U. S. Constitution) to require appointment of counsel in all cases where a defendant is unable to procure the services of an attorney, *and where the right has not been intentionally and competently waived.*" (Emphasis and parenthesis added.)

The doctrine that a defendant can waive his right to counsel is also upheld by the case of *Escobedo vs. Illinois,* 378 U. S. 478. The Court in its opinion stated at page 483:

> "Mr. Cooper (the Assistant State's Attorney) testified that he did not advise petitioner of his constitutional rights, and it is undisputed that no one during the course of the interrogation so advised him."

and again stated at page 485:

> "Without informing him of his absolute right to remain silent in the face of this accusation, the police urged him to make a statement."

The above facts undoubtedly had a lot to do with the decision that the Court came to in that case. In fact it was so stated by the Court in its opinion at pages 490 and 491 where it is stated as follows:

> "We hold, therefore, that where, as here, the investigation is no longer a general inquiry into an unsolved crime but has begun to focus on a particular suspect, the suspect has been taken into police custody, the police carry out a process of interrogations that lends itself to eliciting incriminating statements, the suspect has requested and been denied

> an opportunity to consult with his lawyer, *and the police have not effectively warned him of his absolute constitutional right to remain silent,* the accused has been denied 'the Assistance of Counsel' in violation of the Sixth Amendment to the Constitution as 'made obligatory upon the States by the Fourteenth Amendment * * *.'" (Emphasis added.)

It is undisputed in the case now before the Court that petitioner was fully advised of his constitutional right to remain silent and also of his constitutional right not to take the drunkometer test. Under these facts, there can be no doubt that he voluntarily submitted to the test and waived his right to counsel.

3. Petitioner Was Not Denied Any Constitutional Right Under the Recent Decisions of the Supreme Court of the United States.

The United States Supreme Court has made several recent decisions regarding the right of an accused to confer with legal counsel. In what must still be considered the leading case of the Supreme Court of the United States in regard to this matter, *Crooker vs. The State of California,* the Court stated the rule as follows, 357 U. S. 433, 439; 78 S. Ct. 1287, 1291:

> "The right of an accused to counsel for his defense, though not firmly fixed in our common-law heritage, is of significant importance to the preservation of liberty in this country. That right, secured in State prosecutions by the 14th Amendment guarantee of due process, includes not only the right to have an attorney appointed by the State in certain cases, but also the right of an accused to a *'fair opportunity' to secure counsel of his own choice.*
>
> "Under these principles, State refusal of a request to engage counsel violates Due Process not only if the

> accused is deprived of counsel at trial on the merits, but also if he is deprived of counsel for any part of the pre-trial proceedings, *provided that he is so prejudiced thereby* as to infect his subsequent trial with an absence *of 'that fundamental fairness essential to the very concepts of justice.'* " (Citations omitted.) (Emphasis added.)

The case most relied on by petitioner is *Escobedo vs. State of Illinois, supra.* However, as pointed out previously in this brief the *Escobedo* case is not controlling on the facts of this case now before the Court. The rule as stated by the *Crooker* case was not changed by the *Escobedo* case and in fact the Court so stated in the *Escobedo* case at pages 491 and 492 when it stated the following:

> "Among the critical circumstances which distinguished that case (the *Crooker* case, *supra*) from this one are that the petitioner there, but not here, was explicitly advised by the police of his constitutional right to remain silent and not to 'say anything' in response to the questions."

There can be no question that in our case at hand the petitioner was advised several times that he did not have to take the test if he did not wish to and that the decision was his. With this knowledge, he decided to go ahead and submit to it. In view of this the *Escobedo* case, *supra,* has no bearing on the case now before the court.

Further, the Supreme Court of Ohio in *McQueen vs. Maxwell,* 177 O. S. 30, made a distinction from the *Escobedo* case, *supra,* in which it stated the following:

> "This case presents an issue entirely different from the one in *Escobedo vs. Illinois.* The question raised and disposed of in *Escobedo* related to the right of an accused to consult with *previously retained counsel*

during the course of his interrogation." (Emphasis added.)

As the facts in this case are clearly in conflict with those in the *Escobedo* case, they should not be used as the basis to clarify the decision in the *Escobedo* case.

CONCLUSION.

The petitioner was not denied his constitutional right to confer with his attorney as the fifteen (15) minute delay was not unreasonable and also because he intentionally and knowingly waived his right to counsel. Also, this case is not in conflict with the ruling in the *Escobedo* case as petitioner was definitely advised of his right not to take the Harger Drunkometer test before he voluntarily submitted to it.

For the reasons stated, we respectfully request that the writ of certiorari be denied and that the decisions of the lower courts be affirmed.

Respectfully submitted,

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END